In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1749

ALVIN HARRISON PETERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Western District of Washington, petitioner was convicted on three counts of a four-count indictment charging narcotics offenses (Pet. 3-4; Tr. 129-130).[1] Count One charged that he sold heroin with knowledge that it had been unlawfully imported (21 U.S.C. 174); Count Two, that he sold and dis-

[1] "Tr." refers to the trial transcript, a copy of which is being lodged herewith. Count Three was dismissed at trial (Tr. 88-91) and is not involved.

pensed the same heroin not in or from the original stamped package (26 U.S.C. 4704(a)); and Count Four, that he sold and dispensed cocaine not in or from the original stamped package (26 U.S.C. 4704 (a)). On January 16, 1970, petitioner was sentenced to eight years' imprisonment on Count One and five years on each of the two other counts; these three terms were made to run concurrently (Pet. 7). The court of appeals affirmed in a *per curiam* opinion (Pet. App. A).

The judgment of the court of appeals was entered on January 18, 1971, and a petition for rehearing was denied on March 22, 1971 (Pet. 2). On April 17, 1971, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari until May 21, 1971. The petition was not filed until May 26, 1971, and is thus out of time under Rule 22(2) of the Rules of this Court. In any event, no question meriting further review is presented.

On February 26, 1969, an agent of the Bureau of Narcotics and Dangerous Drugs purchased 3.271 grams of heroin and 7.126 grams of cocaine from petitioner, for $550, in a Seattle, Washington, apartment (Tr. 28-37, 43-44). The narcotics were delivered to the agent by petitioner in two aluminum foil packages, neither of which had tax stamps affixed (Tr. 31, 35). When the agent asked petitioner if he knew where the cocaine came from, petitioner responded that it came from Mexico and that the only cocaine "from the States" was synthetic (Tr. 33).

1. Petitioner was properly convicted of the heroin offense in violation of 21 U.S.C. 174, charged in

Count One. That the instructions on that count dealt with the statutory inference arising from possession (Pet. 9; Tr. 114) was entirely proper under *Turner* v. *United States*, 396 U.S. 398, 405-418.[2]

2. Petitioner's challenge to his convictions on Counts Two and Four is also without merit.

Count Two charged that petitioner did "unlawfully sell, dispense and distribute" (Pet. 3) a quantity of heroin not from the original stamped package in violation of 26 U.S.C. 4704(a). Here, as in *Turner*, "the instruction on the presumption [contained in this statute (Pet. 5-7; Tr. 115-119)] is beside the point, since even if invalid, it was harmless error; the jury must have believed the * * * evidence which in itself established a distribution barred by the statute" (396 U.S. at 421).

Count Four made the identical charge with respect to cocaine. Petitioner's reliance upon *Turner* to support his claim that conviction was improper is not well taken. The essence of the government's case, as revealed by the testimony of the agent, was that *sales* were made not in or from stamp-bearing packages

[2] Petitioner's efforts to distinguish *Turner* are without validity. The contention that the inference authorized by 21 U.S.C. 174 violates the privilege against self-incrimination (Pet. 9-10) was considered and rejected in *Turner* (396 U.S. at 418). Similarly baseless is the suggestion that *Turner* is not controlling since it does not appear from this Court's opinion in that case whether evidence showing the availability of heroin in the United States was presented by the government to the jury, while it is clear that no such evidence was introduced in this case (Pet. 11). The opinion in *Turner* makes clear, however, that no such evidence was presented (396 U.S. at 405-406).

and that the cocaine came from Mexico. The jury must have believed this testimony "since it returned a verdict of guilty" (396 U.S. at 422). Accordingly, unlike *Turner*, where the only evidence was possession, reliance upon the statutory inference was not "critical" (*id.* at 423-424).

At all events, this is clearly an appropriate case for the application of the concurrent sentence rule. Cf. *Benton* v. *Maryland*, 395 U.S. 784, 791; *McGee* v. *United States*, No. 362, this Term, decided May 17, 1971, slip op. 12 n. 15.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1971.

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